

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHN A. MARSHALL,
Plaintiff,

v.

CAROLYN W. COLVIN,¹
Acting Commissioner of Social
Security,
Defendant.

Case No. CV 12-6360 JC

MEMORANDUM OPINION AND
ORDER OF REMAND FOR
IMMEDIATE PAYMENT OF
BENEFITS

[DOCKET NOS. 31, 35]

I. SUMMARY

On July 26, 2012, plaintiff John A. Marshall (“plaintiff”) filed a Complaint seeking review of the Commissioner of Social Security’s denial of plaintiff’s application for benefits. The parties have consented to proceed before a United States Magistrate Judge.

This matter is before the Court on the parties’ cross motions for summary judgment, respectively (“Plaintiff’s Motion”) and (“Defendant’s Motion”). The Court has taken both motions under submission without oral argument. See Fed. R. Civ. P. 78; L.R. 7-15; July 30, 2012 Case Management Order ¶ 5.

¹Carolyn W. Colvin is substituted as Acting Commissioner of Social Security pursuant to Fed. R. Civ. P. 25(d).

1 Based on the record as a whole and the applicable law, the decision of the
2 Commissioner is REVERSED and the case is REMANDED for immediate
3 payment of benefits.

4 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE**
5 **DECISION**

6 On March 15, 2004, plaintiff filed applications for Supplemental Security
7 Income and Disability Insurance Benefits. (Administrative Record (“AR”) 93,
8 660). Plaintiff asserted that he became disabled on or about June 20, 2001, due to
9 “HIV – seizures.” (AR 93, 105, 660). On April 30, 2006, an Administrative Law
10 Judge (“First ALJ”) examined the medical record and heard testimony from
11 plaintiff (who was represented by counsel). (AR 641-56). On May 12, 2006, the
12 First ALJ determined that plaintiff was not disabled through the date of the
13 decision. (AR 55-59).

14 On January 29, 2007, the Appeals Council granted review and vacated the
15 May 12, 2006 decision, in part, because the step four assessment that plaintiff
16 could perform “the full range of light work” conflicted with the findings of the
17 First ALJ at step two that plaintiff had severe impairments of “ataxia, history of
18 seizures and deficits in motor skills” – which, the Appeals Council noted,
19 commonly involve the need for seizure precautions, balance problems, and
20 dexterity difficulties. (AR 62-63). The Appeals Council remanded the matter
21 with instructions to, *inter alia*, reevaluate plaintiff’s residual functional capacity
22 “and provide appropriate rationale with specific references to evidence of record
23 in support of the assessed limitations.” (AR 62-63) (citing 20 C.F.R.
24 §§ 404.1527(f), 416.927(f); Social Security Ruling (“SSR”) 96-8p²). The First
25 ALJ again examined the medical record and heard testimony from plaintiff on
26 June 27, 2007 and November 15, 2007. (AR 612-40)

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28 ²Social Security rulings are binding on the Administration. Terry v. Sullivan, 903 F.2d
1273, 1275 n.1 (9th Cir. 1990).

1 On April 11, 2008, the First ALJ again determined that plaintiff was not
 2 disabled through the date of the decision. (AR 15-23). The Appeals Council
 3 denied plaintiff's application for review of that decision. (AR 6).

4 On December 21, 2009, this Court entered judgment reversing and
 5 remanding the case for further proceedings essentially because it determined that
 6 the First ALJ had materially erred in failing to consider the opinions of plaintiff's
 7 treating physician, Dr. J. Scott Morrow. (AR 681-90). The Appeals Council in
 8 turn remanded the case to a different Administrative Law Judge ("Second ALJ")
 9 for further administrative proceedings. (AR 693-95).

10 On September 8, 2011, the Second ALJ examined the medical record, heard
 11 brief testimony from plaintiff, ordered a consultative psychological evaluation of
 12 plaintiff, and continued the hearing. (AR 886-93). At a supplemental hearing on
 13 February 8, 2012, the Second ALJ heard further testimony from plaintiff (who was
 14 represented by counsel) and a vocational expert. (AR 869-85).

15 On March 28, 2012 the Second ALJ determined that plaintiff was not
 16 disabled through the date of the decision. (AR 660-72). Specifically, the Second
 17 ALJ found: (1) plaintiff suffered from the following severe impairments: history
 18 of seizure disorder and human immunodeficiency virus infection ("HIV") (AR
 19 664); (2) plaintiff's impairments, considered singly or in combination, did not
 20 meet or medically equal a listed impairment (AR 666-67); (3) plaintiff retained the
 21 residual functional capacity to perform light work³ (20 C.F.R. §§ 404.1567(b),
 22 416.967(b)) with additional limitations⁴ (AR 667); (4) plaintiff could not perform
 23 _____

24 ³"Light work involves lifting no more than 20 pounds at a time with frequent lifting or
 25 carrying of objects weighing up to 10 pounds." 20 C.F.R. §§ 404.1567(b), 416.967(b). "[T]he
 26 full range of light work requires standing or walking, off and on, for a total of approximately 6
 27 hours of an 8-hour workday. Sitting may occur intermittently during the remaining time." See
 SSR 83-10.

28 ⁴The Second ALJ determined that plaintiff: (i) could not climb ladders, ropes or
 scaffolds; (ii) could frequently engage in gross and fine manipulation with both hands;

(continued...)

1 his past relevant work (AR 670); (5) there are jobs that exist in significant
 2 numbers in the national economy that plaintiff could perform, specifically back
 3 office helper and mail sorter (AR 671); and (6) plaintiff's allegations regarding his
 4 limitations were not credible to the extent they were inconsistent with the medical
 5 evidence taken as a whole (AR 668) (citing Exhibits 1F through 17F [AR 156-
 6 607, 762-868]).

7 **III. APPLICABLE LEGAL STANDARDS**

8 **A. Sequential Evaluation Process**

9 To qualify for disability benefits, a claimant must show that the claimant is
 10 unable "to engage in any substantial gainful activity by reason of any medically
 11 determinable physical or mental impairment which can be expected to result in
 12 death or which has lasted or can be expected to last for a continuous period of not
 13 less than 12 months." Molina v. Astrue, 674 F.3d 1104, 1110 (9th Cir. 2012)
 14 (quoting 42 U.S.C. § 423(d)(1)(A)) (internal quotation marks omitted). The
 15 impairment must render the claimant incapable of performing the work claimant
 16 previously performed and incapable of performing any other substantial gainful
 17 employment that exists in the national economy. Tackett v. Apfel, 180 F.3d 1094,
 18 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

19 In assessing whether a claimant is disabled, an ALJ is to follow a five-step
 20 sequential evaluation process:

- 21 (1) Is the claimant presently engaged in substantial gainful activity? If
 22 so, the claimant is not disabled. If not, proceed to step two.

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 25 ⁴(...continued)

26 (iii) needed to work in an environment that is quiet and does not involve more than occasional
 27 exposure to moisture or pulmonary irritants; (iv) could not work in an environment where he
 28 could be exposed to hot or cold temperature extremes (due to his prior traumatic brain injury
 ("TBI")); and (v) could not work in a job that involves any contact with members of the public
 due to plaintiff's speech impediment. (AR 667).

1 (2) Is the claimant's alleged impairment sufficiently severe to limit
2 the claimant's ability to work? If not, the claimant is not
3 disabled. If so, proceed to step three.

4 (3) Does the claimant's impairment, or combination of
5 impairments, meet or equal an impairment listed in 20 C.F.R.
6 Part 404, Subpart P, Appendix 1? If so, the claimant is
7 disabled. If not, proceed to step four.

8 (4) Does the claimant possess the residual functional capacity to
9 perform claimant's past relevant work? If so, the claimant is
10 not disabled. If not, proceed to step five.

11 (5) Does the claimant's residual functional capacity, when
12 considered with the claimant's age, education, and work
13 experience, allow the claimant to adjust to other work that
14 exists in significant numbers in the national economy? If so,
15 the claimant is not disabled. If not, the claimant is disabled.

16 Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th
17 Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920); see also Molina, 674 F.3d at
18 1110 (same).

19 The claimant has the burden of proof at steps one through four, and the
20 Commissioner has the burden of proof at step five. Bustamante v. Massanari, 262
21 F.3d 949, 953-54 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1098); see also Burch
22 v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (claimant carries initial burden of
23 proving disability).

24 **B. Standard of Review**

25 Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of
26 benefits only if it is not supported by substantial evidence or if it is based on legal
27 error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir.
28 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457

(9th Cir. 1995)). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

To determine whether substantial evidence supports a finding, a court must “consider the record as a whole, weighing both evidence that supports and evidence that detracts from the [Commissioner’s] conclusion.” Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming or reversing the ALJ’s conclusion, a court may not substitute its judgment for that of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

IV. DISCUSSION

A. The Second ALJ Materially Erred in Assessing the Severity of Plaintiff’s Impairments and Evaluating the Medical Opinion Evidence

Plaintiff contends that a remand is warranted, in part, because the Second ALJ failed to list gait ataxia (*i.e.*, difficulty coordinating the movements required for normal ambulation) as a severe impairment at step two, failed properly to evaluate the medical opinion evidence, and consequently posed an incomplete hypothetical question to the vocational expert. (Plaintiff’s Motion at 20-28). The Court agrees. As the Court cannot find such errors harmless, a remand is warranted.

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1 1. Pertinent Law

2 a. Step Two

3 At step two of the sequential evaluation process, plaintiff has the burden to
4 present evidence of medical signs, symptoms and laboratory findings⁵ that
5 establish a medically determinable physical or mental impairment that is severe,
6 and that can be expected to result in death or which has lasted or can be expected
7 to last for a continuous period of at least twelve months. Ukolov v. Barnhart, 420
8 F.3d 1002, 1004-05 (9th Cir. 2005) (citing 42 U.S.C. §§ 423(d)(3),
9 1382c(a)(3)(D)). Substantial evidence supports an ALJ's determination that a
10 claimant is not disabled at step two where "there are no medical signs or
11 laboratory findings to substantiate the existence of a medically determinable
12 physical or mental impairment." Id. (quoting SSR 96-4p).

13 Step two is "a de minimis screening device [used] to dispose of groundless
14 claims." Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 1996). Applying the
15 normal standard of review to the requirements of step two, a court must determine
16 whether an ALJ had substantial evidence to find that the medical evidence clearly
17 established that the claimant did not have a medically severe impairment or
18 combination of impairments. Webb v. Barnhart, 433 F.3d 683, 687 (9th Cir. 2005)
19 (citation omitted); see also Yuckert v. Bowen, 841 F.2d 303, 306 (9th Cir. 1988)
20 ("Despite the deference usually accorded to the Secretary's application of
21 regulations, numerous appellate courts have imposed a narrow construction upon
22 the severity regulation applied here."). An impairment or combination of
23 impairments can be found "not severe" only if the evidence establishes a slight
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26 ⁵A medical "sign" is "an anatomical, physiological, or psychological abnormality that can
27 be shown by medically acceptable clinical and laboratory diagnostic techniques[.]" Ukolov v.
28 Barnhart, 420 F.3d 1002, 1005 (9th Cir. 2005) (quoting SSR 96-4p). A "symptom" is "an
individual's own perception or description of the impact of his or her physical or mental
impairment(s)[.]" Id. (quoting SSR 96-4p).

1 abnormality that has “no more than a minimal effect on an individual’s ability to
2 work.” Webb, 433 F.3d at 686 (citation omitted).

3 **b. Medical Opinion Evidence**

4 In Social Security cases, courts employ a hierarchy of deference to medical
5 opinions depending on the nature of the services provided. Courts distinguish
6 among the opinions of three types of physicians: those who treat the claimant
7 (“treating physicians”) and two categories of “nontreating physicians,” namely
8 those who examine but do not treat the claimant (“examining physicians”) and
9 those who neither examine nor treat the claimant (“nonexamining physicians”).
10 Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1996) (footnote reference omitted). A
11 treating physician’s opinion is entitled to more weight than an examining
12 physician’s opinion, and an examining physician’s opinion is entitled to more
13 weight than a nonexamining physician’s opinion.⁶ See id. In general, the opinion
14 of a treating physician is entitled to greater weight than that of a non-treating
15 physician because the treating physician “is employed to cure and has a greater
16 opportunity to know and observe the patient as an individual.” Morgan v.
17 Commissioner of Social Security Administration, 169 F.3d 595, 600 (9th Cir.
18 1999) (citing Sprague v. Bowen, 812 F.2d 1226, 1230 (9th Cir. 1987)).

19 The treating physician’s opinion is not, however, necessarily conclusive as
20 to either a physical condition or the ultimate issue of disability. Magallanes v.
21 Bowen, 881 F.2d 747, 751 (9th Cir. 1989) (citing Rodriguez v. Bowen, 876 F.2d
22 759, 761-62 & n.7 (9th Cir. 1989)). Where a treating physician’s opinion is not
23 contradicted by another doctor, it may be rejected only for clear and convincing
24 reasons. Orn v. Astrue, 495 F.3d 625, 632 (9th Cir. 2007) (citation and internal
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26 ⁶Cf. Le v. Astrue, 529 F.3d 1200, 1201-02 (9th Cir. 2008) (not necessary or practical to
27 draw bright line distinguishing treating physicians from non-treating physicians; relationship is
28 better viewed as series of points on a continuum reflecting the duration of the treatment
relationship and frequency and nature of the contact) (citation omitted).

1 quotations omitted). The ALJ can reject the opinion of a treating physician in
2 favor of another conflicting medical opinion, if the ALJ makes findings setting
3 forth specific, legitimate reasons for doing so that are based on substantial
4 evidence in the record. Id. (citation and internal quotations omitted); Thomas v.
5 Barnhart, 278 F.3d 947, 957 (9th Cir. 2002) (ALJ can meet burden by setting out
6 detailed and thorough summary of facts and conflicting clinical evidence, stating
7 his interpretation thereof, and making findings) (citations and quotations omitted);
8 Magallanes, 881 F.2d at 751, 755 (same; ALJ need not recite “magic words” to
9 reject a treating physician opinion – court may draw specific and legitimate
10 inferences from ALJ’s opinion). “The ALJ must do more than offer his
11 conclusions.” Embrey v. Bowen, 849 F.2d 418, 421-22 (9th Cir. 1988). “He must
12 set forth his own interpretations and explain why they, rather than the
13 [physician’s], are correct.” Id. “Broad and vague” reasons for rejecting the
14 treating physician’s opinion do not suffice. McAllister v. Sullivan, 888 F.2d 599,
15 602 (9th Cir. 1989). These standards also apply to opinions of examining
16 physicians. See Carmickle v. Commissioner, Social Security Administration, 533
17 F.3d 1155, 1164 (9th Cir. 2008) (quoting Lester, 81 F.3d at 830-31); Andrews v.
18 Shalala, 53 F.3d 1035, 1042-44 (9th Cir. 1995).

19 **c. Step Five**

20 If, at step four, the claimant meets his burden of establishing an inability to
21 perform past work, the Commissioner must show, at step five, that the claimant
22 can perform some other work that exists in “significant numbers” in the national
23 economy (whether in the region where such individual lives or in several regions
24 of the country), taking into account the claimant’s residual functional capacity,
25 age, education, and work experience. Tackett, 180 F.3d at 1100 (citing 20 C.F.R.
26 § 404.1560(b)(3)); 42 U.S.C. § 423(d)(2)(A). Where, as here, a claimant suffers
27 from both exertional and nonexertional limitations, the Grids do not mandate a
28 finding of disability based solely on the claimant’s exertional limitations, and the

1 claimant's non-exertional limitations are at a sufficient level of severity such that
 2 the Grids are inapplicable to the particular case, the Commissioner must consult a
 3 vocational expert.⁷ Hoopai v. Astrue, 499 F.3d 1071, 1076 (9th Cir. 2007); see
 4 Lounsbury v. Barnhart, 468 F.3d 1111, 1116 (9th Cir.), as amended (2006);
 5 Cooper v. Sullivan, 880 F.2d 1152, 1155 (9th Cir. 1989).

6 The vocational expert's testimony may constitute substantial evidence of a
 7 claimant's ability to perform work which exists in significant numbers in the
 8 national economy when the ALJ poses a hypothetical question that accurately
 9 describes all of the limitations and restrictions of the claimant that are supported
 10 by the record. See Tackett, 180 F.3d at 1101; see also Robbins, 466 F.3d at 886
 11 (finding material error where the ALJ posed an incomplete hypothetical question
 12 to the vocational expert which ignored improperly-disregarded testimony
 13 suggesting greater limitations); Lewis v. Apfel, 236 F.3d 503, 517 (9th Cir. 2001)
 14 ("If the record does not support the assumptions in the hypothetical, the vocational
 15 expert's opinion has no evidentiary value."); Embrey, 849 F.2d at 422
 16 ("Hypothetical questions posed to the vocational expert must set out *all* the
 17 limitations and restrictions of the particular claimant . . .") (emphasis in original;
 18 citation omitted).

19 **2. Pertinent Medical Evidence**

20 In a Physician Statement dated October 28, 2002, Dr. J. Scott Morrow,
 21 plaintiff's treating physician, essentially opined that plaintiff could lift and carry
 22 no weight, could stand/walk 2-4 hours in an 8-hour day, and could sit less than 6
 23 hours in an 8-hour day with breaks. (AR 193-96).

24 On July 11, 2011 Dr. Ursula Taylor, a state-agency examining physician,
 25 performed an Independent Internal Medicine Evaluation which included an

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 27 ⁷The severity of limitations at step five that would require use of a vocational expert must
 28 be greater than the severity of impairments determined at step two. Hoopai v. Astrue, 499 F.3d
 1071, 1076 (9th Cir. 2007).

1 examination of plaintiff. (AR 763-68). In her July 2011 report, Dr. Taylor
2 diagnosed plaintiff with traumatic brain injury (“TBI”) and HIV, observed that
3 plaintiff had “trouble with balance and coordination” (*i.e.*, plaintiff appeared
4 “somewhat generally unsteady,” at one point “almost fell off the examination
5 table,” had trouble performing a “tandem walk,” “ambulated with only mild
6 antalgia,” and had mild leg stiffness which suggested possible “movement
7 disorder”), and opined, in pertinent part, that due to a “history of traumatic brain
8 injury, seizures and trouble with balance and coordination,” plaintiff (i) could only
9 lift/carry 20 pounds occasionally and 10 pounds frequently; (ii) could walk and
10 stand up to four hours out of an eight-hour day, but was limited to at most
11 standing/walking 20 minutes at any one time “due to general unsteadiness”;
12 (iii) could not balance; (iv) could occasionally stoop, kneel, crouch, and crawl;
13 (v) could occasionally climb stairs and ramps; (vi) could never climb ladders and
14 scaffolds; (vii) was limited to frequent reaching in all directions and above
15 shoulder level, gross handling, fine fingering, feeling, pushing and pulling in both
16 hands; and (viii) was limited to frequent use of feet. (AR 767-68).

17 The Second ALJ found that plaintiff had a history of prior right leg fracture
18 which was “not [] severe” because the record did not show that plaintiff
19 experienced “any pain or other functional limitation related to [the] condition.”
20 (AR 665). The Second ALJ stated that his finding was consistent with the report
21 of a January 31, 2003 Internal Medicine Examination of plaintiff, in which Dr.
22 Raymond Lee, a state-agency examining physician, stated that while plaintiff had
23 “a mild noticeable slight limp with gait,” plaintiff denied having any related pain,
24 plaintiff had no evidence of obvious bony abnormalities on examination, and there
25 were no physical limitations related to plaintiff’s limp. (AR 665) (citing Exhibit
26 3F at 4 [AR 172]). The Second ALJ stated that his finding was also supported by
27 the July 2011 opinions of Dr. Taylor, who “did not diagnose [plaintiff] with any
28 medical condition related to [plaintiff’s] lower extremities, and did not report that

1 [plaintiff exhibited] any physical functional limitations related to his lower
2 extremities.” (AR 665) (citing Exhibit 10F at 4-5 [AR 766-67]).

3 **3. Analysis**

4 The Court finds that a remand is warranted because the Second ALJ erred in
5 assessing the severity of plaintiff’s impairments and evaluating the medical
6 opinion evidence, and the errors cannot be deemed harmless since the Second ALJ
7 did not adequately account for all of plaintiff’s medical impairments in later steps
8 of the sequential evaluation process. Cf. Lewis v. Astrue, 498 F.3d 909, 911 (9th
9 Cir. 2007) (failure to address particular impairment at step two is harmless if ALJ
10 fully evaluates claimant’s medical condition in later steps of sequential evaluation
11 process).

12 First, plaintiff has presented evidence which suggests that gait ataxia was a
13 severe impairment. For example, as noted above, Dr. Taylor found that plaintiff
14 had limitations in his abilities to walk, stand and do postural activities due to
15 trouble with balance and coordination. (AR 766-67). In a November 29, 2004
16 Physician Statement, Dr. Kalvin Yu, another treating physician, stated that
17 plaintiff had “periodic gait ataxia – will not improve per neurologist” and opined
18 that plaintiff had “mild physical limitations” with “documented cerebellar
19 degeneration which may affect his long-term motor skills.” (AR 193-94). Dr.
20 Miguel Valdas-Sueiras, also a treating physician, noted plaintiff’s coordination as
21 “slowed” and that plaintiff’s gait reflected “mild difficulty” with tandem walking
22 and “dystonic posturing with ambulation.” (AR 221, 239, 296, 541). A physician
23 at the Venice Family Clinic also noted that plaintiff had a “wide based” gait and
24 decreased ambulation bilaterally. (AR 813, 817). In light of the foregoing, the
25 Court cannot conclude that plaintiff’s gait ataxia had no more than a minimal
26 effect on plaintiff’s ability to work.

27 Second, the Second ALJ’s decision does not expressly address plaintiff’s
28 alleged gait ataxia. The Second ALJ did note that plaintiff had a “history of []

1 prior right leg fracture.” Nonetheless, the Second ALJ found the impairment non-
2 severe in part because Dr. Taylor purportedly “did not report that [plaintiff]
3 exhibit[ed] any physical functional limitations related to his lower extremities.”
4 (AR 665) (citing Exhibit 10F at 4-5 [AR 766-67]). As noted above, however, Dr.
5 Taylor opined that plaintiff had multiple functional limitations related to his lower
6 extremities (*i.e.*, walking, standing and postural movement) due, in part, to
7 plaintiff’s apparent “trouble with balance and coordination.” (AR 767). The
8 Second ALJ’s incorrect characterization of the medical evidence calls into
9 question the validity of both the Second ALJ’s evaluation of the severity of
10 plaintiff’s impairments and the Second ALJ’s decision as a whole. See, e.g.,
11 Regennitter v. Commissioner, 166 F.3d 1294, 1297 (9th Cir. 1999) (A “specific
12 finding” that consists of an “inaccurate characterization of the evidence” cannot
13 support an adverse credibility determination); see also Valenzuela v. Astrue, 247
14 Fed. Appx. 927, 929 (9th Cir. 2007) (finding ALJ’s credibility determination
15 unsupported by substantial evidence where it was based in part on “inaccurate
16 characterization” of claimant’s testimony); Lesko v. Shalala, 1995 WL 263995, *7
17 (E.D.N.Y. Jan. 5, 1995) (“inaccurate characterizations of the Plaintiff’s medical
18 record” found to constitute reversible error). Therefore, the Second ALJ’s failure
19 to address plaintiff’s gait ataxia at step two of the sequential evaluation process
20 constituted error. See Webb, 433 F.3d at 686-87 (citations omitted).

21 Third, the Second ALJ failed properly to consider significant and probative
22 medical opinion evidence which, in part, addressed plaintiff’s medical condition
23 (*i.e.*, gait ataxia). For example, although the Second ALJ stated that he “generally
24 concur[red]” with Dr. Taylor’s July 2011 evaluation of plaintiff (AR 665), the
25 Second ALJ’s residual functional capacity assessment for plaintiff did not account
26 for several functional limitations Dr. Taylor identified for plaintiff. For example,
27 Dr. Taylor opined that plaintiff could “walk and stand no more than four hours out
28 of an eight-hour day due to trouble with balance and coordination and general

1 unsteadiness” and that plaintiff could stand and walk for no more than 20 minutes
2 at any one time, again “due to general unsteadiness. . . .” (AR 767). In contrast,
3 the Second ALJ determined that plaintiff could perform work at the “light
4 exertional level” (AR 667), which generally involves standing or walking for up to
5 six hours out of an eight-hour workday. See 20 C.F.R. §§ 404.1567(b),
6 416.967(b) (light work “requires a good deal of walking or standing”); SSR 83-10
7 at *5-*6 (“[T]he full range of light work requires standing or walking, off and on,
8 for a total of approximately 6 hours of an 8-hour workday.”). The Second ALJ’s
9 residual functional capacity assessment also did not limit plaintiff to
10 standing/walking only 20 minutes at a time, and did not account for Dr. Taylor’s
11 opinions that plaintiff “should not be doing balancing” and could only frequently
12 use his feet. (Compare AR 667 with AR 767).

13 In addition, although the Second ALJ also stated that he concurred with the
14 evaluations provided by Dr. Morrow (AR 669), the Second ALJ failed properly to
15 consider such evaluations and/or account in plaintiff’s residual functional capacity
16 assessment for several functional limitations identified therein. For example, like
17 the First ALJ, the Second ALJ here erroneously attributes to Dr. Morrow the
18 opinions in Dr. Yu’s November 29, 2004 physician statement. (AR 193-94).
19 Even so, Dr. Yu opined that plaintiff’s lifting/carrying was limited to less than 10
20 pounds frequently (not up to 10 pounds as the Second ALJ notes). (Compare AR
21 193-94 with AR 669). Moreover, in an October 28, 2002 Physician Statement, Dr.
22 Morrow opined that plaintiff could not lift or carry any weight at all, could only
23 stand/walk for 2-4 hours in an 8-hour day, and could sit less than 6 hours in an 8-
24 hour day with breaks. (AR 195-96). Here, the Second ALJ’s residual functional
25 capacity assessment does not account for Dr. Morrow’s significant functional

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1 limitations – which are inconsistent with even sedentary work⁸ – even though this
2 Court previously remanded the case to afford the Commissioner an opportunity
3 properly to consider and weigh Dr. Morrow’s October 28 Physician Statement
4 with the other treating and examining opinions of record. (AR 687-88). The
5 Second ALJ’s failure to account for the foregoing medical opinion evidence was
6 itself legal error. See Vincent v. Heckler, 739 F.2d 1393, 1394-95 (9th Cir. 1984)
7 (An ALJ must provide an explanation when he rejects “significant probative
8 evidence.”) (citation omitted).

9 Fourth, since the hypothetical question the Second ALJ posed to the
10 vocational expert did not include the aforementioned limitations and restrictions
11 (AR 667), the Court cannot conclude that the vocational expert’s testimony based
12 on such incomplete hypothetical, which the Second ALJ adopted, was substantial
13 evidence supporting the Second ALJ’s determination at step five that plaintiff
14 could perform any of the representative occupations. See Tackett, 180 F.3d at
15 1101 (vocational expert’s testimony may constitute substantial evidence of a
16 claimant’s ability to perform work which exists in significant numbers in the
17 national economy only when ALJ poses a hypothetical question that accurately
18 describes all of the limitations and restrictions of the claimant that are supported
19 by the record); see also Robbins, 466 F.3d at 886 (finding material error where the
20 ALJ posed an incomplete hypothetical question to the vocational expert which
21 ignored improperly-disregarded testimony suggesting greater limitations); Lewis,
22 236 F.3d at 517 (“If the record does not support the assumptions in the
23 hypothetical, the vocational expert’s opinion has no evidentiary value.”); Embrey,

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26 ⁸“Sedentary work involves lifting no more than 10 pounds at a time and occasionally
27 lifting or carrying articles like docket files, ledgers, and small tools.” 20 C.F.R. §§ 404.1567(a),
28 416.967(a). “[A]t the sedentary level of exertion, periods of standing or walking should
generally total no more than about 2 hours of an 8-hour workday, and sitting should generally
total approximately 6 hours of an 8-hour workday.” See SSR 83-10.

1 849 F.2d at 422 (“Hypothetical questions posed to the vocational expert must set
 2 out *all* the limitations and restrictions of the particular claimant”) (emphasis
 3 in original; citation omitted).

4 Finally, the Court cannot find the Second ALJ’s errors harmless. The Court
 5 cannot conclude that the vocational expert would have opined (or that the Second
 6 ALJ relying upon such opinion would have determined) that plaintiff could
 7 perform other work which exists in significant numbers in the national economy if
 8 the Second ALJ had included in the hypothetical question posed to the vocational
 9 expert the significant limitations found by Dr. Morrow which, as noted above,
 10 essentially precluded even sedentary work. Similarly, Dr. Taylor’s opinions that
 11 plaintiff could stand and walk for no more than 20 minutes at any one time,
 12 together with Dr. Morrow’s limitations, also suggest that plaintiff might need to
 13 take additional unscheduled breaks during an eight-hour workday. At the
 14 February 8, 2012 hearing, however, the vocational expert testified that there would
 15 be no work available if plaintiff (or a hypothetical individual with the same
 16 characteristics as plaintiff) required three additional 10 minute breaks in a day.
 17 (AR 884). Defendant points to no persuasive evidence in the record which
 18 otherwise could support the Second ALJ’s determination at step five that plaintiff
 19 was not disabled. See Stout, 454 F.3d at 1055 (ALJ’s error harmless where it is
 20 “inconsequential to the ultimate nondisability determination”).

21 **B. Reversal and Remand for Immediate Payment of Benefits Is** 22 **Appropriate**

23 When a court reverses an administrative determination, “the proper course,
 24 except in rare circumstances, is to remand to the agency for additional
 25 investigation or explanation.” Immigration & Naturalization Service v. Ventura,
 26 537 U.S. 12, 16 (2002) (citations and quotations omitted); Moisa v. Barnhart, 367
 27 F.3d 882, 886 (9th Cir. 2004) (same) (citing id.). Even so, the choice whether to
 28 reverse and remand for further administrative proceedings, or to reverse and

1 remand for immediate payment of benefits is within the discretion of the Court.
2 See Harman v. Apfel, 211 F.3d 1172, 1178 (9th Cir.), cert. denied, 531 U.S. 1038
3 (2000); Reddick v. Chater, 157 F.3d 715, 728 (9th Cir. 1998). Where, like here,
4 an ALJ improperly rejected medical opinion evidence, the erroneously rejected
5 evidence should be credited and an immediate payment of benefits directed (rather
6 than a remand for further proceedings) when: “(1) the ALJ failed to provide
7 legally sufficient reasons for rejecting the evidence; (2) there are no outstanding
8 issues that must be resolved before a determination of disability can be made; and
9 (3) it is clear from the record that the ALJ would be required to find the claimant
10 disabled were such evidence credited.” Benecke v. Barnhart, 379 F.3d 587, 593
11 (9th Cir. 2004) (citations omitted); see also Harman, 211 F.3d at 1178 (“[T]he
12 necessity for further proceedings properly is evaluated under the general rule that
13 remand is appropriate if enhancement of the record would be useful.”).

14 Here, the Court concludes that plaintiff’s case should be reversed and
15 remanded for immediate payment of benefits. Although defendant argues, in a
16 conclusory fashion, that the Court should remand the case for further
17 administrative proceedings (Defendant’s Motion at 30), such arguments do not
18 persuade the Court that a remand would be fruitful or fair. First, as discussed
19 above, the Second ALJ failed to account for significant and probative medical
20 evidence in which doctors essentially opined that plaintiff suffered from disabling
21 impairments. Second, defendant points to no outstanding issues that must be
22 resolved before a determination of disability can be made in this case. Third, as
23 noted above, the record reflects that a person who suffered the significant
24 limitations identified by Drs. Taylor and Morrow would be precluded from all
25 work. Therefore, it is clear that the Second ALJ would be required to find plaintiff
26 disabled if the Second ALJ fully credited such opinion evidence.

27 It would not be fair to plaintiff to afford the Commissioner a third
28 opportunity properly to evaluate the medical opinion evidence and assess

1 plaintiff's residual functional capacity – issues that were material to the Second
2 ALJ's ultimate disability determination. See, e.g., Benecke, 379 F.3d at 595
3 (allowing Commissioner a second chance to decide the “central issue” in
4 claimant's case “create[s] an unfair ‘heads we win; tails, let's play again’ system
5 of disability benefits adjudication.”) (citation omitted); Moisa, 367 F.3d at 887
6 (“The Commissioner . . . should not have another opportunity to show that
7 [plaintiff] is not credible any more than [plaintiff], had he lost, should have an
8 opportunity for remand and further proceedings to establish his credibility.”)
9 (citation omitted); Grayson v. Astrue, 2012 WL 4468406, *8 (E.D. Cal. Sep. 25,
10 2012) (remanding for payment of immediate benefits where ALJ failed to provide
11 legally sufficient reasons for rejecting treating physician's opinions and the ALJ
12 would have been required to find plaintiff disabled if such opinions were
13 credited).

14 **V. CONCLUSION**

15 For the foregoing reasons, the decision of the Commissioner of Social
16 Security is reversed and the case is remanded for immediate payment of benefits.

17 LET JUDGMENT BE ENTERED ACCORDINGLY.

18 DATED: June 30, 2013

19 _____
/s/

20 Honorable Jacqueline Chooljian
21 UNITED STATES MAGISTRATE JUDGE
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